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Attorney for the Guam Power Authority

OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

| | | |
|------------------|---|-------------------------------------|
| IN THE APPEAL OF |) | DOCKET NO. OPA-PA-08-004 |
| |) | |
| O&M ENERGY, S.A. |) | FILING OF PROCUREMENT RECORD |
| |) | |
| Appellant. |) | |
| _____ |) | |

COMES NOW, GUAM POWER AUTHORITY (GPA), by and through its attorney, D. GRAHAM BOTHA, ESQ., and hereby files the Procurement Record pursuant to 2 GAR §12104. RESPECTFULLY SUBMITTED this 14th day of March, 2008, by: 



D. GRAHAM BOTHA, ESQ.
Legal Counsel for the Guam Power Authority

**Guam Power Authority
PMC Cabras 1&2**

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GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O. BOX 2977 HAGATNA, GUAM U.S.A. 96932-2977

January 18, 2008

MEMORANDUM

TO: General Manager
VIA: Supply Management Administrator
FROM: Buyer Supervisor I
SUBJECT: **Analysis on Multi-Step Invitation for Bid No.: GPA-013-07**

Invitation for Bid No.: GPA-013-07 is to procure for "Performance Management Contract (PMC) Cabras 1 & 2 Steam Power Plants" as requested by SPORD/Generation Administration.

Invitation for Bid No.: GPA-013-07 was officially announced and advertised in the Pacific Daily News on August 7, 2007. Seven (7) prospective bidders expressed their interest by acknowledging receipt of the bid package commencing August 8, 2007 thru August 31, 2007. In addition to this, letters of solicitation was sent to Twenty (20) companies from August 10, 2007 thru August 16, 2007. The bid was officially opened and read at 2:00 P.M., November 16, 2007. Four (4) Bidders submitted their Unpriced Technical Proposal and Price Proposals, namely:

1. **Taiwan Electric & Mechanical Engineering Services, Inc (TEMES)**
Net Present Value (NPV) offered:
\$26,899,305.98

Awarded. Bidder was deemed qualified on the evaluation of Step 1 and proceeded to Step 2. Based on the evaluation of Step 2, Bidder was determined to be the most responsive and responsible Bidder.

2. **Union Fenosa (O & M Energy)**
Net Present Value (NPV) offered:
\$20,245,171.68

Not Awarded. Bidder was deemed qualified on the evaluation of Step 1 and proceeded to Step 2. Based on the evaluation of Step 2, Bidder was determined to be non-responsive based on the following Exceptions:

- a. A US\$200,000 limit on yearly unscheduled maintenance cost
- b. A US\$50,000 limit on yearly Performance Testing
- c. The cost of Management Staff vehicles and utilities are excluded from the proposal
- d. A budget that is subject to negotiation of the escalation rate.

3. Pruvient Energy Guam, Inc.

Bid withdrawal requested on January 22, 2008.
Bidder did not qualify based on the evaluation of Step 1 (Unpriced Technical Proposal).

4. Hart Inc. U.S.A.

Bid withdrawal requested on January 16, 2008.
Bidder did not qualify based on the evaluation of Step 1 (Unpriced Technical Proposal).

In view of the attached analysis and approval from the Evaluation Committee Selection, I recommend that Taiwan Electric and Mechanical Engineering Services, Inc. be awarded in the amount of \$26,899,305.98 as being the most responsive and responsible bidder.

Should you have any questions, I can be reached at Ext. 3046.

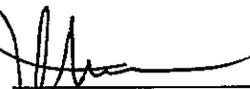

Jesse R. T. Reyes

CONCURRED BY:

APPROVED BY:


JAMIE L.C. PANGELINAM
Supply Management Administrator

Date


JOAQUIN C. FLORES, P.E.
General Manager

Date

1/25/08

BID/RFP PACKAGING CHECKLIST

IFB NO.: GPA-013-07
DESCRIPTION: Performance Management Contract (PMC) Cabras 1 & 2 Steam Power Plants
END-USER: SPORD/Gen. Admin
BUYER: Rose Cruz

- 1. (XX) Requisition Date Received: 02/12/07 By: RC(Initial)
- 2. (XX) Specification with Signature.
- 3. (XX) Special Reminders to Prospective Bidders.
- 4. (XX) Invitation for Bid Form.
- 5. (XX) Formulated Bid Specification.
- 6. (XX) Special Provision to Affidavits.
- 7. (XX) Major Shareholders Disclosure Affidavit Form.
- 8. (XX) Non-Collusion Affidavit Form.
- 9. (XX) Bid Bond Form.
- 10. (XX) Gov. Guam General Terms and Conditions Form.
- 11. (XX) Sealed Bid Solicitation Instructions Form.
- 12. (XX) Purchase Order No. 11180, for advertisement.
- 13. (XX) IFB advertisement (copy).
- 14. (XX) Date Bid Issued: August 7, 2007
- 15. (XX) Bid Opening Date: November 16, 2007 Time: 4:00 P.M.
- 16. (XX) Bidders Register/Sign-In.
- 17. (XX) Bid Abstract.
- 18. (XX) Number of Vendors participating 4
- 19. (XX) Correction, Withdrawal, etc. after bid opening and before award:
(XX) Yes () No
- 20. (XX) Analysis & Recommendation (s):
(XX) Award () Rebid () Cancelled
- 21. () Bid Status.
- 22. (XX) Letter of Intent (s).
- 23. (XX) Performance Bond Form.
Vendor: TEMES Due Date: _____
Vendor: _____ Due Date: _____

(NOTE: Issued 14 days from the date of Notice of Intent of Possible Award)

- 24. (XX) Purchase Order for Award and Completion of Contract of Bid.
- 25. (XX) Awarding of Purchase Order:

| <u>Vendor (s):</u> | <u>P.O. No. (s):</u> | <u>Amount:</u> |
|--------------------|----------------------|--------------------------------------|
| <u>TEMES</u> | <u>12311</u> | <u>\$897,785.00 (Fixed Mgmt Fee)</u> |
| <u>TEMES</u> | <u>12319</u> | <u>\$927,700.00 (O&M Fees)</u> |
- 26. () Original & Acknowledgement copies of purchase order (s);
- 27. () Receiving Report Due Date: _____
- 28. () Deposit Return

Remarks:

I certify that all records under IFB: GPA-013-07 are true and complete to the best of my knowledge. I further certify that there is no request for confidentiality submitted with the bid and that all records are available for public inspection upon written request.

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(Amendment I, Vol. I)

Invitation For Multi-Step Bid

No. GPA-013-07

PERFORMANCE MANAGEMENT CONTRACT

FOR THE

**GUAM POWER AUTHORITY
CABRAS #1 AND #2 STEAM POWER PLANT**



Balajadia

ANDRIANO E. BALAJADIA

jr.

Acting General Manager

AUGUST 2007

Invitation For Multi-Step Bid

No. GPA-013-07

PERFORMANCE MANAGEMENT CONTRACT

FOR THE

**GUAM POWER AUTHORITY
CABRAS #1 & #2 STEAM POWER PLANT**



Volume I

Commercial Terms & Conditions

AUGUST 2007

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Table 1: Bid Schedule

| Bid Process | Milestone | From Date | To Date |
|-------------|--|-----------|----------|
| | Bid Announcement | 08/07/07 | 08/07/07 |
| | Bid Documents Available | 08/07/07 | 10/08/07 |
| | Submit Questions | 08/07/07 | 10/02/07 |
| | Mandatory Pre-Bid Conference | 09/10/07 | 09/10/07 |
| | Mandatory Plant Tour | 09/10/07 | 09/13/07 |
| | Cut Off Date for Receipt of Questions | 10/02/07 | 10/02/07 |
| | GPA Review and Answer Questions | 08/07/07 | 10/08/07 |
| | Vendor Prepare Bids | 10/10/07 | 11/08/07 |
| | Plant Tour (Optional) | 09/25/07 | 09/26/07 |
| | Cut Off Date for Receipt of Bids/Bid Opening | 11/09/07 | 11/09/07 |
| | Bid Evaluation | 11/13/07 | 11/19/07 |
| Step One: | Determine & Notify Qualified Bidders | 11/20/07 | 11/20/07 |
| Step Two: | Opening & Evaluation of Price Proposal / Selection of Vendor | 11/21/07 | 11/23/07 |
| | Evaluation Approval/Recommendation | 11/26/07 | 12/04/07 |
| | Contract Negotiation | 12/05/07 | 12/21/07 |
| | Contract Approval & Award | 12/26/07 | 01/04/08 |
| | Transition Period/Contract Mobilization | 01/04/08 | 01/04/08 |
| | PMC Operational Commencement | 01/04/08 | 01/04/08 |

1.1. Invitation for Bid (IFB) Document Organization

Invitation for Bid documents are organized into five separate volumes, as follows:

- Volume I — Commercial Terms and Conditions
- Volume II — Technical and Functional Requirements
- Volume III — Cabras Units #1 & #2 Plant Technical Description
- Volume IV — Proposal Scoring Mechanism
- Volume V — Appendices

In addition, the IFB documents include two sets of electronic spreadsheets (Microsoft Excel Workbooks):

- Qualitative Proposal Scoring.xls
- Price Proposal Evaluation.xls.

1.2.3. Plant (Cabras Units #1 & #2) Staff

GPA currently has a total of 45 filled and 14 vacant positions at the Cabras Units #1 & #2 plant, which includes an assistant plant superintendent, plant shift supervisors, plant maintenance supervisors, control board operators, operators (I / II / III), instrument technician, electrician, plant maintenance mechanics, and apprentices. Bid Proponents must provide the staff levels required to operate this plant as part of their bids.

An organizational chart, employee listing, and position descriptions can be found in Appendix H.

1.2.4. Scope of the Performance Management Contract

The PMC shall utilize best operation and maintenance practices, training, and management techniques to accomplish key performance indicators (KPIs) for Cabras Units #1 & #2 such as:

- Equivalent Availability Factor as defined by NERC/GADS Standards
- Equivalent Force Outage Rate as defined by NERC/GADS Standards
- Relative Heat Rate

In addition to the KPIs, the CONTRACT scope includes functional requirements that cover several key areas related to the operations and maintenance of the Cabras Units #1 & #2 Power Plant:

- Financing;
- Budget;
- Compensation Structure;
- Staffing;
- Training;
- Operations;
- Maintenance;
- Performance Improvement Projects;
- Operations and Maintenance of Goods and Services;
- Inventory Management and Control;
- Contract Terms;
- Communications and Reporting; and,
- Environmental Compliance.

1.3. IFB Document Media

The five-volume set of IFB documents and all Amendments to this IFB shall be made available to BIDDERS in electronic forms including:

2. Instructions to Bidders

These instructions to bidders are intended to provide guidance in the preparation of bids and do not constitute part of the bid or of the contract document.

This is a multi-step bid procurement. In Step One, only the submitted Technical Proposals will be evaluated. In Step Two, the Price Offers based upon Technical Proposals that are determined to be acceptable, either initially or as a result of discussions, will be considered for award.

2.1. Correspondence

2.1.1. Language

The official language of Guam is English. The bid and all accompanying documents shall be in English.

2.1.2. Commercial and Technical Correspondence

Any prospective BIDDER desiring an explanation or interpretation of the solicitation, commercial terms, Technical Specification, etc., must make a request in writing to GPA at the address listed below, referencing the Invitation for Bid No.

ATTENTION: JOAQUIN C. FLORES
GENERAL MANAGER

GUAM POWER AUTHORITY
POST OFFICE BOX 2977
HAGATNA, GUAM 96932-2977

FAX: 1 (671) 648-3165

In addition, BIDDERS may also make this request by writing to the GPA PMC Procurement Officer at gpa-pmc-ifb@gpagwa.com.

All inquiries must be received by Procurement no later than October 02, 2007. Oral explanations or instructions given will not be binding. Any information given to a prospective BIDDER concerning a solicitation will be furnished promptly to all parties recorded by Procurement as having received the Invitation for Bid as an amendment to the solicitation if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective BIDDERS.

2.5. Familiarity With Laws

The BIDDER shall be familiar with all Federal (U.S.) and local laws, ordinances, rules and regulations of Guam that in any manner affect the work. Ignorance of law on the part of the BIDDER will not relieve the BIDDER from responsibility.

2.6. Cost of Bidding

BIDDERS shall bear all costs associated with the preparation and submission of its proposal. GPA will not be responsible or liable for those costs, regardless of the outcome of the IFB process.

2.7. Basis of Price/Cost Data Furnished with Technical Proposals

The Vendors are required to submit their price offers as found in the MS EXCEL Workbook, Price Proposal Evaluation.xls with their technical proposals in a **separate sealed envelope marked "PRICE PROPOSAL" and indicating the date and time of bid package remittance.** The vendors are required as part of the data requirements to furnish a fixed management fee, an O&M Spending Budget, and Performance Guarantees for each year of the contract as specified in the IFB documents.

2.8. Price/Cost Data

BIDDERS shall provide prices/costs in U.S. Dollars. The BIDDER shall provide any equipment and material prices on the basis of CIF to the Guam job site unloaded and shall provide a breakdown of the price/cost data.

The Price/Cost Data Sheet is contained in Appendix G.

2.9. Documents Executed Outside Guam

The Power of Attorney, performance bond guarantee, and documents defining the constitution of the joint venture, consortium, company or firm, if executed outside Guam, whether required to be submitted with the proposals or after the award of the contract, must be authenticated by a Notary Public or other official authorized to witness sworn statements. For those electing to use the Electronic Proposal Submittal Process, receipt of an electronic copy of these documents will suffice to meet the submittal deadline. However, the original must be sent to GPA and post-marked no later than the proposal due day.

2.10. Step One Procedures

The following outlines the requirements for technical (non-price) proposal submittals.

contract. Categories shall include project management, engineering, analysis, programming, training, and field support.

3. Three or more client references and project description summaries for work performed under similar scope to this project.

Submittal of the following supplementary information is mandatory. **GPA shall automatically disqualify any proposal submitted without the supplementary information listed below:**

4. A copy of the BIDDER's Articles of Incorporation or other applicable forms concerning business organization (i.e. partnership, sole proprietorship, etc.) and By-Laws;
5. Affidavit of Disclosure of Major Shareholder (Appendix D);
6. Audited financial information on BIDDER's firm and all subcontractors that will be used in the performance management of Cabras Units #1 & #2 Power Plant. This information shall be complete for the last five-years. BIDDERS must include their Dunn and Bradstreet Number or Other Major Credit Rating Agency rating.
7. Certificate of Good Standing to conduct business in jurisdiction of residence;
8. Non-collusion Affidavit (Appendix E);
9. Information regarding outstanding claims against the BIDDER, if any; and,
10. Bid Bond (Appendix J)
11. Current Guam Business License (applicable to this multi-step IFB and other additional requirement) shall be submitted at the time of bid closing.

2.10.2. Proposal Submittal

2.10.2.1. Manual And Electronic Options For Proposal Submittal

BIDDERS shall execute the submittal of their proposals using one and only one of the following procedures:

- Manual;
- Electronic.

Each prospective BIDDER will be given an ftp account and password on the <http://www.guampowerauthority.com/procurement/index.html> domain and up to 50 MB

agreement must include a clause stating that the members of the joint venture are severally and jointly bound.

Wherever a legal signature is required, receipt of an electronic signature will suffice to meet the submittal deadline for those electing to use the Electronic Proposal Submittal process. The original signed documents must be reproduced electronically and be placed in the submitted compressed archive file. However, the original documents must be sent to GPA via post or courier and post-marked no later than the bid-opening date. In addition, GPA receipt and acceptance of an electronic scanned copy of Notarized documents in Adobe Acrobat PDF with the compressed archive submitted prior to the opening of bids as meeting the proposal deadline. However, the original documents must be sent to GPA via post or courier and post-marked no later than the bid-opening date.

2.10.2.4. Manual Proposal Submittal Package Format And Handling

This section describes the proposal package format and content required by GPA that is specific to manual submittal of proposals. The Manual IFB Proposal Submittal Process is characterized by a preponderance of the submitted material in tangible printed media form that is hand-delivered by an authorized agent of the BIDDER to an authorized agent of the Guam Power Authority. Both the BIDDERS and GPA agents are live human beings. In addition, both parties perform non-repudiation of the proposal through the execution of manually executed signatures, seals and time stamps.

BIDDERS are required to submit one original and six (6) bound copies of their proposal including one completed electronic copy on one disk of the Qualitative Scoring Workbook and another on another disk of the Price Proposal Evaluation Workbook. The BIDDERS are advised to keep a copy of the completed Workbooks and test the electronic copy on disk prior to sending it off to GPA.

2.10.2.5. Marking and Packaging of Proposals

As a general rule, the manually submitted Proposals shall be submitted in separate sealed packages with the following information clearly marked on the outside of each side:

- 1) "TECHNICAL (UNPRICED) PROPOSAL" OR "PRICE PROPOSAL"
- 2) "PERFORMANCE MANAGEMENT CONTRACT CABRAS UNITS #1 & #2";
- 3) The BIDDER's Name;
- 4) INVITATION FOR BID NUMBER;
- 5) CLOSING DATE and TIME (Guam Standard Time).
- 6) Addressed As follows:

ATTENTION: JOAQUIN C. FLORES
GENERAL MANAGER
GUAM POWER AUTHORITY

-
- Physically and electronically secured computers for storage of IFB materials.

GPA makes no warranties on these processes manual or electronic.

2.10.2.8. Electronic Proposal Submittal Package Format And Handling

The BIDDER must submit his entire proposal by performing the following:

- Creating a password protected, single compressed archive of his proposal using PKWARE's PKZIP 4.5 using a digital signature
- By uploading this archived entire proposal to his assigned account.

The digital signature must have the same force of law as that of signature of a person duly authorized to commit the BIDDER to its proposal. By its use of this digital signature, the BIDDER commits itself to its proposal and signifies that it has been delivered to GPA whole, complete and unaltered.

The BIDDER shall send the password to only the following authorized GPA persons via e-mail:

The GPA Procurement Officer at gpa-pmc-afb@gpagwa.com.

The BIDDER shall send this password prior to November 09, 2007, Guam Standard Time. In addition, the BIDDER shall send directions on how to retrieve the protected files from the archive, and an assurance that the BIDDER has tested the archive files.

2.10.3. Technical Proposal Submission Date

The Technical Proposal opening date and time is November 09, 2007, 4:00 p.m. Guam standard time. This opening time and date is also referred to as the Proposal submittal deadline or submittal date. Technical Proposals shall not be accepted after the proposal opening date.

2.10.4. Proposal Changes During Bid Process

Changes may be made to the Technical Proposal(s) prior to the proposal submittal due date.

2.10.5. Evaluation of Technical Proposals

After the Close of the Technical Proposal submission date, GPA will evaluate the Proposals.

GPA will use the score from the Qualitative Scoring Workbook to evaluate the contents of Proposals and categorize the Proposals as:

such BIDDER shall not be afforded an additional opportunity to supplement its technical offer.

2.11. Step Two Procedures.

Upon completion of evaluation of Technical Proposals, qualified bidders will be notified and GPA will proceed with the Step Two of the multi-step bid.

2.11.1. Request for Price Proposal/Offer and Performance Guarantees

Each selected BIDDER from the Qualified Bidders list will be notified and GPA will open their submitted Price Offer in the MS EXCEL workbook Priced Proposal Evaluation.xls. GPA will select a vendor based on a comprehensive evaluation of the price offer and performance guarantees as specified in Volume IV.

2.11.1.1. Proposal Changes During Bid Process

Changes may be made to the Price Offer prior to the proposal submittal due date.

2.11.1.2. Proposal Validity

All price/cost data submitted with the BIDDERS' proposals shall remain firm and open for acceptance for a period of not less than six (6) months after the Proposal submittal date defined elsewhere and thereafter shall be subject to renewal by mutual agreement between the BIDDER and GPA. BIDDER shall state the actual date of expiration in their proposal.

2.11.2. Preliminary Examination of Priced Offer

GPA will examine the Priced Offer on the opening date to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents have been properly signed, and whether the Priced Offers are generally in order.

Arithmetical errors will be rectified on the following basis. If there is discrepancy between the unit price and the total price, including any discounts, that is obtained by multiplying the unit priced and quantity, the unit price shall prevail and the total price shall be corrected. If the Bidder does not accept the correction of the error, its bid will be rejected. If there is a discrepancy between words and figures, the amount in words will prevail.

2.11.3. Evaluation Criteria and Comparison of Priced Offers

GPA will evaluate and compare the Priced Offers for Bidder's Technical Proposals that were determined during Step One to be responsive to the tender document requirements.

materials will be promptly returned. The reasons for cancellation or rejection shall be made a part of the procurement file that is available for public inspection. After opening, but prior to award, all proposals may be rejected in whole or in part when the Procurement Officer determines that such action is in the Territory's best interest for reasons including but not limited to:

- a) The supplies and services being provided are no longer required;
- b) The solicitation did not provide consideration of other factors of significance to the Territory;
- c) All otherwise acceptable proposals received have clearly unreasonable price/cost data;
- d) There is reason to believe that the proposals may not have been independently arrived at in open competition, may have been collusive and may have been submitted in bad faith;

Any individual proposal may be rejected in whole or in part when in the best interest of the Territory.

2.12.5. Disqualification of BIDDER

When, for any reason, collusion or other anticompetitive practices are suspected among BIDDERS or offerors, a notice of the relevant facts shall be transmitted to the Guam Attorney General. BIDDERS suspected of collusion or other anticompetitive practices may be suspended or debarred from participating in future procurement opportunities for a specified period.

2.12.6. False Statements In Proposal

BIDDERS must provide full, accurate, and complete information as required by this solicitation and its attachments. The penalty for making false statements in any proposal or bid is prescribed in 18 U.S.C. 1001 and Title 9, Guam Code Annotated. Note, by use of a digital signature to sign the proposal, the BIDDER agrees that this act legally binds the BIDDER to his proposal.

2.13. Award of Contract

The contract will be awarded to the BIDDER evaluated as being qualified and with the best-priced proposal.

The successful BIDDER will be notified in writing (letter or e-mail or fax) of the intent to award the contract, and will be required to send to Guam, within ten (10) days of the date

A bid bond for an amount of \$150,000.00 (USD) is required and may be in the following form:

- a. Cash, Bank Draft or Certified Check made payable to the Guam Power Authority;
- b. By wire transfer to Guam Power Authority, Account No. 601-007247, Routing No. 121405115, Bank of Guam, P. O. Box BN, Hagatna, Guam 96932
- c. Letter of Credit;
- d. Surety Bond – valid if accompanied by:
 - (1) Current Certificate of Authority to do business on Guam issued by the Department of Revenue and Taxation;
 - (2) Power of Attorney issued by the Surety to the Resident General Agent
 - (3) Power of Attorney issued by two (2) major officers of the Surety to whoever is signing on their behalf.

Bonds, submitted as Bid Guarantee, without signatures and supporting documents are invalid and bids will be rejected.

If a BIDDER desires to submit a bid bond with an acceptable bonding company, the BIDDER must submit original copies of Appendix J.

The BIDDER shall complete Form A-1 by initialing the Invitation For Bid Documents received from Guam Power Authority, including the latest IFB Amendment received. This Form is an acknowledgement of receipt, review and understanding of the IFB documents.

3.1.2. Proposal Submittal Checklist

The BIDDER shall complete Form A-2. This Form provides an inventory of documents submitted by the BIDDER in response to the Proposal requirements.

3.1.3. Major Shareholders Disclosure Affidavit

The BIDDER shall fill out the Major Shareholders Disclosure Affidavit form in Appendix D and submit it with its Proposal.

3.1.4. Non-collusion Affidavit

The BIDDER shall fill out the Non-collusion Affidavit form in Appendix E and submit it with its Proposal.

3.1.5. Local Procurement Preference Application

The BIDDER shall fill out and sign the Local Procurement Preference Application in Appendix M and submit it with its Proposal.

3.2. Price Proposal Form

3.2.1. Annual Fixed Management Fee Price and O&M Spending/Cost Data Sheet

The qualified BIDDERS shall complete the Annual Fixed Management Fee Price and O&M Spending/Cost Data Sheet contained in the MS EXCEL Workbook Price Proposal Evaluation.xls. This workbook outlines the BIDDER's Annual Fixed Management Fee, O&M Spending proposal and performance guarantees.

Qualified BIDDERS shall proposed a Fixed Management Fee and an O&M budget based on the object codes as specified in the form for each contract year.

3.2.2. Performance Guarantee Proposal

The BIDDER shall complete the Performance Guarantee Proposal contained in the same workbook above. This workbook outlines the BIDDER's minimum performance guarantees.

4.1.7. Defective

An adjective which when modifying the words Goods or Special Services refers to Goods or Special Services which are unsatisfactory, faulty, deficient, do not conform to the Contract Documents, or do not meet the requirements of any inspection, reference standard, test, or approval referred to in the Contract Documents.

4.1.8. Drawings

Drawings are all official drawings approved by the ENGINEER and showing the character and scope of the Goods to be furnished.

4.1.9. Effective Date of the Contract Agreement

The date indicated in the Purchase Agreement on which it becomes effective, or if no such date is indicated, the date by which the Purchase Contract is signed by both parties.

4.1.10. ENGINEER

Wherever the words "ENGINEER" or "ENGINEERS" appear in the CONTRACT Documents, it shall mean GPA's engineer duly appointed as "ENGINEER". GPA shall assign several ENGINEERS as required to cover specialized areas of expertise.

4.1.11. ENGINEER's Instructions

Written instructions issued by ENGINEER which clarify or interpret the CONTRACT Documents or order minor changes or alterations in the Goods or Special Services to be furnished but which do not involve a change in the Purchase Price or the Delivery Time.

4.1.12. General Manager

The General Manager is the Chief Executive Officer of the Guam Power Authority. The office and title of General Manager shall apply to any person acting in a regular or in an acting capacity as the Chief Executive Officer of the Guam Power Authority.

4.1.13. Goods

All property required to be furnished by CONTRACTOR under the procurement documents.

4.1.14. Modification

A written amendment of the Purchase Agreement signed by both parties, or Change Order, or ENGINEER's Instructions.

4.1.23. SITE or Site

The SITE is the area where the Project is to be constructed or executed. In this case, the SITE is the Cabras Units #1 & #2 Power Plant as delineated in Volume II Technical and Functional Requirements and Volume III Cabras Units #1 & #2 Plant Technical Description.

4.1.24. Special Services

Services to be furnished by CONTRACTOR at the Cabras Units #1 & #2 Power Plant as required by the Contract Agreement.

4.1.25. Territory

The Territory of Guam.

4.2. Agreement

Prior to entering into a formal agreement, GPA and CONTRACTOR shall resolve and document any differences between the CONTRACTOR's proposal and the tender documents.

The Agreement between GPA and CONTRACTOR shall consist of the tender documents, as resolved by the CONTRACTOR's final negotiated Proposal and by GPA amendments, and the CONTRACTOR's proposal, as adjusted by a prioritized list of documents generated during the evaluation and negotiation processes and agreed to and acknowledged in writing by both parties. These documents may consist of, but are not limited to, written answers to questions, letters, and written clarifications to the proposal.

Any formal contract document shall reference GPA tender documents and the CONTRACTOR's proposal. No oral understanding or statement shall modify the Agreement. Changes to the above documents can only be made in accordance with the procedure for modifications as defined in **Section 4.15 Changes**.

The resolved tender documents shall take priority over and shall govern in all cases of conflict with the adjusted proposal. The CONTRACTOR's contractual obligation shall be to fulfill all requirements of the tender documents, as resolved, and to provide all features of the CONTRACTOR's proposal, as adjusted.

The tender documents are intended to be complementary, what is called for by one shall be as binding as if called for by all. If not otherwise specified in the tender documents, these General Conditions shall apply. If, during performance of the Agreement CONTRACTOR detects a discrepancy in the tender documents, CONTRACTOR shall so report to ENGINEER in writing at once and shall obtain a written interpretation or

Where the Agreement covers the reimbursement of the traveling or living expenses of the CONTRACTOR's employees or agents, the CONTRACTOR agrees to furnish complete itemization and breakdowns of such expenses when requested by GPA.

In the event of any changes to or termination of the Agreement, or the furnishing of goods or services on a labor hour or a cost reimbursable basis, CONTRACTOR shall supply information in such detail as may be reasonably required by GPA to support all applicable charges. GPA, or an independent auditor designated by GPA, shall have the right to audit, during normal working hours, CONTRACTOR's accounts and records relating to such charges. The expense of such audit will be borne by GPA.

4.6. Waiver of Claims

The making and acceptance of final payment will constitute:

A waiver of all claims by GPA against CONTRACTOR, except claims arising from unsettled liens, claims relative to defective Goods or special services appearing after final payment, or from failure to comply with the Contract Documents or the terms of any special guarantees specified therein; nor will final payment constitute a waiver by GPA of any rights in respect of CONTRACTOR's continuing obligations under the Procurement Documents; and

A waiver of all claims by CONTRACTOR against GPA other than those previously made in writing and still unsettled.

4.7. Supervision and Coordination by CONTRACTOR

CONTRACTOR shall competently and efficiently manage, supervise, and direct production of the Goods and furnishing of Special Services and coordinate all operations required to deliver the Goods and furnish any required Special Services.

CONTRACTOR shall designate, in writing to GPA, a person with authority to act on behalf of CONTRACTOR with respect to CONTRACTOR's obligations under the CONTRACT Documents, and all communications given to or received from that person will be binding on CONTRACTOR.

CONTRACTOR shall perform all such activities as an independent contractor and not as an agent of GPA. When others furnish materials and equipment for assembly by the CONTRACTOR, CONTRACTOR shall receive, unload, store, and handle it and become responsible therefore as though CONTRACTOR was furnishing such materials and/or equipment under the Agreement.

4.8. Substitutions

in which the item functions. CONTRACTOR shall make corrections required by ENGINEER when drawings or documents are marked "Approved As Revised" and shall return the required number of corrected copies.

GPA and/or ENGINEER shall have the right to reproduce any and all drawing, prints, or other data or documents received from CONTRACTOR that are considered necessary for engineering, construction, or other purposes, despite any notice to the contrary appearing on the item. When a drawing or document approval is required by the Specifications, CONTRACTOR shall not commence production of any part of the Goods affected thereby until such drawing or document has been reviewed and approved by ENGINEER.

ENGINEER's review and approval of CONTRACTOR's drawings or documents will not relieve CONTRACTOR from responsibility for any deviations from the Contract Documents unless CONTRACTOR has in writing called ENGINEER's attention to such deviation at the time of submission and ENGINEER has given written concurrence and approval to the specific deviation, nor will any concurrence or approval by ENGINEER relieve CONTRACTOR from responsibility for errors or omissions in the drawings or documents submitted.

4.10. Continuing Performance

CONTRACTOR shall continue its performance under the Agreement during all claims, disputes, or disagreements with GPA. Production of Goods will not be delayed or the timely delivery of Goods or furnishing of Special Services be prejudiced, delayed, or postponed pending resolution of any claims, disputes, or disagreements, except as CONTRACTOR and GPA may otherwise agree in writing.

4.11. Access to Goods in Production

CONTRACTOR shall provide representatives of GPA, testing agencies, and governmental agencies with jurisdictional interests proper and safe access to Goods in the process of production at reasonable times as is necessary for the performance of their functions in connection with the Contract Documents.

4.12. Expediting

CONTRACTOR shall expedite delivery of the Goods and any related work of subcontractors. When requested or required by the Contract Documents, CONTRACTOR shall also provide GPA with an itemized schedule for engineering, outsourcing, fabrication, and shipping, which shall be followed by expediting reports including status of deliveries of materials and/or equipment purchased from subcontractors, if any, each month during its performance under the Agreement. If CONTRACTOR encounters delay in obtaining materials, or foresees any delay in its own manufacturing works, CONTRACTOR shall immediately inform GPA of such situation.

4.14.2. Submission of Cost or Pricing Data

The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of Section 3-403 (Cost or Pricing Data) of the Guam Procurement Regulations.

4.15. Changes

4.15.1. Change Order

By a written order, at any time, and without notice to surety, the Procurement Officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

- a) Drawings, designs, or Specifications, if the supplies to be furnished are to be specially manufactured for the Territory in accordance therewith;
- b) Method of shipment or packing; or
- c) Place of delivery.

4.15.2. Time Period for Claim

Within 30 days after receipt of a written change order under **Paragraph 4.15.1 Change Order**, unless the Procurement Officer extends such period in writing or e-mail, The CONTRACTOR shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the CONTRACTOR's claim unless the Territory is prejudiced by the delay in notification.

4.15.3. Claims Barred After Final Payment

No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

4.15.4. Other Claims Not Barred

In the absence of such a change order, nothing in this clause shall be deemed to restrict the CONTRACTOR's right to pursue a claim arising under the contract if pursued in accordance with the clause entitled, "Claims Based on the General Officer's Actions or Omissions, - Notice of Claim", or for breach of contract.

4.16. Contract Price

The Contract Price constitutes the total consideration to be paid by GPA to THE CONTRACTOR for the complete delivery of the Goods, Special Services, and for performing other services in connection therewith in accordance with the Contract

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- Penalty Compensation Payments due to CONTRACTOR's failure to meet its minimum performance guarantees.
 - EAF – Annually
 - EFOR - Annually
 - Relative Heat Rate – Bi-annually

4.18. Forced Majeure

Forced Majeure referred to herein shall mean an occurrence beyond the control and without the fault or negligence of the party affected including, but not limited to, acts of God or the public enemy, expropriation or confiscation; changes in law procedures, war, rebellion, or riots; floods, unusually severe weather that could not reasonably have been anticipated; fires, explosions, epidemics, catastrophes, or other similar occurrences which are not within the control of the party affected. However, the following shall not be considered as Force Majeure:

- a) Delay caused by lack or inability to obtain raw materials, congestion at CONTRACTOR's or its subcontractor's facilities, or elsewhere; market shortages, or similar occurrences, or
- b) Delay, either on the part of THE CONTRACTOR or its subcontractors, caused by shortages of supervisors or labor, inefficiency, or similar occurrences, or
- c) Sabotage, strikes, or any other concerted acts of workmen, which occur only in the facilities of THE CONTRACTOR or its subcontractors.

Should the circumstances of Force Majeure continue over a period of ninety (90) days, GPA has the right, if no other understanding is reached, to terminate the whole Agreement or any part thereof in accordance with Paragraph 4.28. Any delay or failure in performing the obligations under the Contract Documents of the parties hereto shall not constitute default under the Purchase Contract or give rise to any claim for damages or loss or anticipated profits if, and to the extent, such delay or failure is caused by Force Majeure, and if a claim is made therefore.

4.18.1. Invocation of Force Majeure

The party invoking Force Majeure shall perform the following:

- a) Notify the other party as soon as reasonably possible by facsimile, e-mail, telex, cable or Messenger/courier of the nature of Force Majeure, anticipated exposure time under Force Majeure, and the extent to which the Force Majeure suspends the affected party's obligations under the CONTRACT;

Any part(s) supplied in replacement of the defective part(s) of the Goods or any Goods repaired pursuant to the provisions of this Paragraph shall be supplied or repaired on the same terms and conditions as provided for herein for the supply of the Goods and in particular a new warranty period shall apply. Such new warranty period shall expire on the date twelve (12) months from the date of such replacement or repair or on the expiration date of the warranty for the original Goods that were replaced or repaired, whichever is later.

In the event the CONTRACTOR furnishes special services for installation and startup, such services shall be rendered in a competent and diligent manner and in accordance with the Contract Documents, accepted industry practice and any applicable professional standards.

4.20. Tests and Inspections

GPA or its designee shall have the right to inspect or observe the production, inspection, or testing of the Goods at any time and place including the CONTRACTOR's facilities and those of its subcontractors where the Goods are being produced.

THE CONTRACTOR shall conduct, at its responsibility and expense, all tests and inspections called for by the Contract Documents. In the event that witness inspection by GPA is required under the Contract Documents, the costs and expense arising therefrom shall be borne by the CONTRACTOR, including inspector's fees, transportation, hotel, and general flying expenses. In the event that CONTRACTOR's inspection is required at the site, CONTRACTOR's transportation, hotel, and general living expenses shall be borne by THE CONTRACTOR.

Any inspection made by the inspector of GPA and/or its designee will be final. Such inspections or the witnessing of CONTRACTOR's test and inspection by GPA and/or its designee shall not relieve THE CONTRACTOR of any of its responsibilities or liabilities under the Contract Documents, nor be interpreted in any way as implying acceptance of the Goods.

THE CONTRACTOR shall repair and replace, without cost or delay, anything found defective by tests and inspections, and also to bear all costs of re-inspection.

The CONTRACTOR must carry out at its authority and expense any inspection required by statutory Authority, governmental regulation, or other similar Authority on the codes or standards.

4.21. Remediating Defective Goods

If at any time after GPA's acceptance of delivery under Paragraph 4.4, and before expiration of the correction period under Paragraph 4.19, GPA determines that the

The Procurement Officer may, by written order to the CONTRACTOR, at any time, and without notice to any surety, require the CONTRACTOR to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding ninety-days (90-days) after the order is delivered to the CONTRACTOR, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:

- a) Cancel the stop work order; or
- b) Terminate the work covered by such order, as provided in the 'Termination for Default Clause' or the 'Termination for Convenience Clause' of this contract.

4.22.2. Cancellation or Expiration of the Order

If a stop work order issued under this clause is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the CONTRACTOR shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price shall be modified in writing accordingly, if:

- a) The stop work order results in an increase in the time required for, or in the CONTRACTOR's cost properly allocable to, the performance of any part of this contract; and
- b) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

4.22.3. Termination of Stopped Work

If a stop work order is not canceled and the work covered by such order is terminated for default or Convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

4.23. Termination for Convenience

4.23.1. Termination

4.23.4. Compensation Under Termination for Convenience

The CONTRACTOR shall perform the following for compensation under termination for convenience.

- a) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for Convenience together with cost or pricing data to the extent required by **Section 3-403 (Cost or Pricing Data) of the Guam Procurement Regulations** bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph (c) of this Paragraph.
- b) The Procurement Officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR has filed a termination claim supported by cost or pricing data to the extent required by **Section 3-403 (Cost or Pricing Data) of the Guam Procurement Regulations** and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by GPA, the proceeds of any sales of supplies and manufacturing materials, and the contract price of the work not terminated.
- c) Absent complete agreement under Subparagraph (b) of this Paragraph, the Procurement Officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under Subparagraph (b) shall not duplicate payments under this subparagraph:
 - i. Contract prices for supplies or services accepted under the contract;
 - ii. Costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the CONTRACTOR would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 - iii. Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to **Paragraph 4.23.2** of this clause. These costs must not include costs paid in accordance with other subparagraphs of this Paragraph;
 - iv. The reasonable settlement costs of the CONTRACTOR including accounting, legal, clerical, and other expenses reasonably necessary for the

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- (02) It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the CONTRACTOR must give the buyer [i.e., GPA] reasonable notice of the time and place of the resale; and,
 - (03) If the goods are not to be within the view of those attending the sale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective BIDDER s; and
 - (04) The CONTRACTOR may buy.
 - (5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer [i.e., GPA] even though the CONTRACTOR fails to comply with one or more of this section's requirements.
 - (6) The CONTRACTOR is not accountable to the buyer [i.e., GPA] for any profit made on any resale. A person in the position of a CONTRACTOR (Section 2707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (Subsection 3) of Section 2711."

4.24. Termination for Defaults

4.24.1. Default

If the CONTRACTOR refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer may notify the CONTRACTOR in writing of the delay or non-performance and if not corrected in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the CONTRACTOR's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part the Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Procurement Officer. The CONTRACTOR shall continue performance of the contract to the extent it is not terminated and shall be liable for excess cost incurred on procuring similar goods or services.

4.24.2. CONTRACTOR's Duties

in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph 4.24.4(Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for Convenience of GPA, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for Convenience of GPA, the contract shall be adjusted to compensate for such termination and the contract modified accordingly subject to the CONTRACTOR's rights under Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations.

4.24.6. Additional Rights and Remedies

The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

4.25. Disputes

All controversies between GPA and the CONTRACTOR, which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be resolved under Guam Procurement Law and the Government Claims Act.

4.26. Consequential Damages

Unless expressly provided for otherwise in this Agreement, neither party, including their agents and employees, shall be liable to the other party for consequential damages, including, but not limited to, loss of use, loss of profit and interest due to breach of contract, breach of warranty, negligence, or any other cause whatsoever, provided nothing herein shall relieve CONTRACTOR from its liability for injury to persons or property, including property of GPA, whether such liability arises in contract, including breach of warranty, or tort, including negligence.

4.27. Notices

Whenever any provision of the Contract Documents requires the giving of written notice it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

4.28. Computation of Time

When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period. If the last day of any

all the remainder of this Agreement valid and enforceable. All such deletions or modifications shall be the minimum necessary to effect the foregoing.

4.33. Rights and Remedies

The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto, will be in addition to, and shall not be construed in any way as a limitation of any rights and remedies available to any or all of them which are otherwise imposed or available by law or contract, by special warranty or guarantee, or by other provisions of the Contract Documents, and the provisions of this paragraph shall be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right, and remedy to which they apply. All representations, warranties, and guarantees made in the Contract Documents will survive final payment and termination or completion of this Agreement.

4.34. New material

Unless this contract specifies otherwise, the CONTRACTOR represents that the Goods and components are new. If the CONTRACTOR believes that furnishing used or reconditioned Goods or components will be in GPA's interest, the CONTRACTOR shall so notify GPA in writing. The CONTRACTOR's notice shall include the reasons for the request along with a proposal for any consideration to GPA if GPA authorizes the use of used or reconditioned Goods or components.

4.35. Claims based on the General Manager's Action or Omissions

If any action or omission on the part of the General Manager, or his/her designee, requiring performance changes within the scope of the contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

- (1) The CONTRACTOR shall have given written notice to the General Manager, or his/her designee:
 - i. Prior to the commencement of the work involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
 - ii. Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did

4.36. Standard Work Schedule

Work scheduled and performed by the CONTRACTOR on GPA's premises shall conform to published GPA working hours and shall account for GPA's observed holidays.

4.37. Interference with Operation

Interference with normal operation of GPA's facilities or equipment, or that of any CONTRACTORS or subcontractors on GPA's premises, shall be avoided. The GPA's representative will determine in advance whether such interference is unavoidable and will establish the necessary procedures under which the interferences will be allowed.

4.38. Release of Information

The CONTRACTOR shall not release any information, including the contract price concerning this project or any part thereof in any form, including advertising, news releases, or professional articles, without written permission of GPA.

4.39. Liens

In the event that a lien of any nature shall at any time be filed against the hardware, firmware, or software or the CONTRACTOR's facility by any person, firm, or corporation which has supplied material or services at the request of the CONTRACTOR, and for the cost of which the CONTRACTOR is liable under the terms of the Agreement, the CONTRACTOR agrees, promptly on demand of GPA and at the CONTRACTOR's expense, to take any and all action necessary to cause any such lien to be released or discharged therefrom. The CONTRACTOR agrees to hold GPA harmless from all liens, claims, or demands in connection with the Work.

4.40. Title

Title to any of the hardware, firmware, and software, management practices, training and other documents and/or processes required by GPA to continue the improved operations and maintenance of the Cabras Units #1 & #2 Plant will pass to GPA upon placement of the equipment within GPA's premises prior to commencement of its installation, subject to GPA's inspection thereof.

The CONTRACTOR shall retain title and be responsible for movement of the equipment from the delivery carrier onto the premises and the subsequent unpacking of the equipment.

If, for any reason, the Work is terminated prior to its completion, the title to all the Work performed to that time including all hardware, firmware, software, management practices, training and other documents and/or processes required by GPA to continue the improved

4.42.2. Certificate of Insurance

Contractor shall furnish certificates of insurance and waiver of subrogation endorsement to owner prior to commencement of work showing evidence of such coverage, including the statement to the effect that cancellation or termination of the insurance shall not be effective until at least (10) days after receipt of written notice to owner. At all times Contractor's insurance shall be primary to any other insurance that may be carried by Owner. The statement of limits of insurance coverage shall be construed as in any way limiting the Contractor's liability under this agreement. Owner shall be an additional insured on all liability coverage and certificates of insurance shall clearly indicate such.

4.42.3. Insurance Company and Agent

All insurance policies herein required of the Contractor shall be written by a company duly authorized and licensed to do business in the State or Territory where work under this contract is being performed and be executed by some agent thereof duly licensed as an agent in said State or Territory.